
THE BRECHNER REPORT

Volume 28, Number 10 ■ A monthly report of mass media law in Florida

Published by The Brechner Center for Freedom of Information ■ College of Journalism and Communications ■ University of Florida

October 2004

Court judge rules groups' meetings are open to public

CITRUS COUNTY – A judge ruled in favor of two Citrus County property owners, stating that Environmental Resource and Regulatory Agency Group (ERRAG) meetings are subject to

ACCESS MEETINGS

Florida's Open Meetings Law. Leon County Circuit Court Judge

Janet E. Ferris ordered the Florida Department of Transportation to open its meetings to the public, while the court retained jurisdiction to decide how to redress any decisions made at five agency group meetings that already took place.

The plaintiffs, Bobby Roscow and Teddi Bierly, have asked that actions from those meetings be ruled void.

The dispute stemmed from meetings between the Suncoast Parkway Advisory Group (SPAG), which is comprised of state and county officials, and ERRAG. The two groups met to discuss a project that would extend the Suncoast Parkway through Citrus County.

SPAG's meetings are open to the public, but ERRAG bars the public from meetings under the premise that the group doesn't make decisions.

According to the *St. Petersburg Times*, Roscow argued that decisions were made during the meetings between the two groups and that notes the state gave the public from the meetings were censored.

Judge Ferris said the agency group is bound to discuss private property acquisition, land issues and property values during its meetings while selecting a possible route for the parkway extension. Therefore, its meetings must be open to the public.

Colorado Supreme Court upholds prior-restraint order, Breyer disagrees

DENVER – The Colorado Supreme Court upheld a prior-restraint order in the Kobe Bryant trial, ruling that media organizations can't publish a transcription of a closed-door hearing. Later, following an opinion from a U.S. Supreme Court Justice, the trial's district judge released an edited version of the transcription.

In June, a court clerk mistakenly e-mailed the transcript to seven media organizations, which were immediately told by District Judge Terry Ruckriegle that they would be in contempt of court if they published the information. The Colorado Supreme Court upheld Ruckriegle's prior-restraint order, which the media groups later appealed to U.S. Supreme Court Justice Stephen Breyer. The media's friend-of-the-court brief was addressed to Breyer because he handles emergency appeals from the federal circuit that includes Colorado.

Breyer issued an opinion saying a recent ruling allowing information about

the alleged victim's sex life to be admitted in Bryant's trial may change the lower court's decision to bar media from publishing the transcript.

"Their release, I believe, is imminent," Breyer said of the transcripts.

Ruckriegle redacted 68 lines out of nearly 200 pages of the transcript that detailed testimony dealing with Colorado's rape-shield law. A majority of the transcript's information was released on Aug. 2; some of it had been released on July 29.

"It is with great reluctance that this court releases these transcripts," Ruckriegle wrote. "The effect of this release is to present narrowly-limited, one-sided evidence and argument to the public prior to the selection of a jury and without reference to the totality of the evidence."

Bryant pleaded not guilty to felony sexual assault and in September, prosecutors dropped all charges against him. The accused victim is continuing her civil suit, seeking financial damages.

Judge denies access to Smith records

SARASOTA – A judge denied *The Bradenton Herald's* request to release sealed records in the case of Joseph P. Smith, who is accused of kidnapping and killing 11-year-old Carlie Brucia.

The newspaper wanted access to records that supposedly detailed a jail conversation in which Smith told his brother, John, where to find Carlie's body. In June, the records were accidentally released to the *Sarasota Herald-Tribune*. *The Herald* claimed the documents should be released because they no longer affect Smith's right to a fair trial.

Smith's attorney, Adam Tebrugge, argued against the release, stating the

documents contain defendant statements and should never have been released. Circuit Judge Andrew Owens agreed, saying he would not release the records because they were part of more than 2,500 pages of evidence which he ordered to be sealed earlier this year.

"It's more important to uphold the integrity of my prior order," he said.

Carlie disappeared Feb. 1. Her abduction was caught on tape by a surveillance video, which spawned a massive search leading to Smith's arrest. According to the *Herald-Tribune*, sheriff's deputies found Carlie's body after a jail conversation between Smith and his brother.

Judge refuses to seal deposition transcript

BROWARD COUNTY – A Broward County circuit judge refused to seal the deposition of a doctor who was sued for allegedly sharing his patients' personal information with a marketer.

In 2002, patients sued Dr. Ken Burke and accused him of participating in a marketing effort that included mailing a monthly supply of Prozac Weekly, an antidepressant made by Eli Lilly & Co., to patients without their prior knowledge. Nearly 300 patients have joined the lawsuit against Burke, Eli Lilly and Walgreens Co., where the mailings supposedly originated.

Burke's lawyer recently asked a judge to seal the transcripts of a deposition and sworn statements from other doctors in the practice.

"The press does not have a First Amendment right to pretrial discovery," attorney Michael Petrucci said, adding that sealing the information would help ensure that Burke received a fair trial, "free from media publicity."

Judge Robert Andrews discounted Petrucci's argument because the attorney "offered no evidence" to show how previous news accounts had harmed Burke, "even if we assume a substantial amount of negative publicity."

"The judge's order upholds the long-standing constitutional right for citizens to know what is going on in their court system," said attorney Gary Farmer, who represents numerous clients who have claimed invasion of privacy.

DECISIONS ON FILE

Copies of case opinions, Florida Attorney General opinions, or legislation reported in any issue as "on file" may be obtained upon request from the Brechner Center for Freedom of Information, College of Journalism and Communications, 3208 Weimer Hall, P.O. Box 118400, University of Florida, Gainesville, FL 32611-8400, (352) 392-2273.

AGO: Security business cannot obtain certain home security information

TALLAHASSEE – Attorney General Charlie Crist issued an advisory legal opinion in response to a city attorney's request, saying certain home security information is private.

Palm Bay City Manager Lee Feldman said a Melbourne resident with a security business requested access to the names and addresses of applicants for alarm permits, all people and businesses cited for violation of the city's alarm ordinance and the addresses of all police runs to alarms. However, a state law passed by the Florida Legislature following the 2001 terrorist attacks, protects security system information.

"Our code as well as our reading of the statute was that this information was confidential," Feldman said. "[The man seeking the records] insisted that it wasn't. I can certainly see, from his

perspective, it may not be as clear as we saw it."

Palm Bay City Attorney Nicholas Tsamoutales asked for Crist's opinion in March.

Crist wrote that releasing the requested information would reveal the existence of security systems, which would violate the state law.

"The disclosure of the names and addresses contained in the specified records would necessarily reveal the existence of security systems," he wrote. "It is my opinion, therefore, that [state statutes] preclude public disclosure...."

JoAnn Carrin, a spokeswoman for Crist, said the opinion is not law but serves to clarify the current statute.

"You can still get information about the numbers of violations or the numbers of security calls," she said.

Airlines release passenger information

WASHINGTON – Six airlines, four more than originally disclosed, gave private passenger information to government contractors who were testing prototypes of an airport screening system, the Bush administration said.

Rear Adm. David M. Stone, the acting administrator for the Transportation Security Administration, told the Senate Committee of Governmental Affairs that passengers' names and other information, including credit card information, e-mail addresses and telephone numbers, were given to companies with whom the agency had agreements to develop the prototype of the Computer Assisted Passenger Profiling System II (CAPPS II).

Previously, only JetBlue and American Airlines were identified as having supplied information for the new passenger-screening system, but Stone said Delta, Continental Airlines, America West Airline and Frontier Airlines also supplied passengers' information.

"I think it is important that the public knows that some identifying data is going to be disclosed to a government agency, even if it is for legitimate purposes," Sen. Susan Collins, the committee's chairwoman, said.

Adm. Stone said the agency asked

four private companies, HNC Software, Infoglide, Ascent Technology and Lockheed Martin, to compete for a

contract to develop prototypes of software for CAPPS II.

The agency also contacted Airline Automation, a company that manages passenger information for some domestic carriers, to obtain personal information to use in testing the prototypes. Later, the contractors contacted the company directly and obtained passenger information, circumventing the airlines. It was unclear if the airlines knew that the contractors had gained access to their passengers' information. Regardless, many privacy advocates argue that the information was obtained secretly.

"The government has to be able to test ways to improve the system," said Ari Schwartz, an associate director at the Center for Democracy and Technology, an advocacy group for privacy. "The question is, 'Why do it in secrecy?'"

According to Adm. Stone's testimony, Continental denied the agency's request for passenger information, yet contractors were still able to obtain the information from Airline Automation. In addition, although Delta supplied information to the agency, airline officials later said that the data was artificially created.

PRIVACY

Department releases records detailing child abuse, child neglect case

BROOKSVILLE—The Department of Children & Families (DCF) released records of a Royal Highlands couple accused of starving a 10-year-old girl placed in their care.

On June 22, Media General, the parent company of *The Tampa Tribune* and WFLA-TV News Channel 8, petitioned the court to open the records.

In the petition, Media General said it realized cases involving child abuse or child neglect are confidential. But, Rachel Fugate, the company's lawyer, said that in cases with "tragic" circumstances, the public's right to evaluate the state's failures supersedes privacy concerns.

In July, according to *The Tribune*, DCF agreed to release the records, acknowledging the need to balance confidentiality laws with the public's right to know.

Circuit Judge Richard Tombrink reviewed the records and instructed state attorneys on what material should or should not be deleted from the documents.

The documents detailed DCF's decision to place the girl and her half brother with Lori Allain and her husband, Arthur "Tommy" Allain. The Allains were accused of starving the girl, who weighed 29 pounds when she was pulled from their home, and have been charged with aggravated child abuse and child neglect. According to *The Tribune*, the couple denied the abuse charges.

According to Don Thomas, the District 13 district administrator for DCF, caseworkers were negligent in placing the child in a home that "would not meet the standards, and would never meet the standards of a foster home."

Thomas said an independent task force appointed by DCF secretary, Jerry Regier, has made 39 recommendations to the department for changes. The district office has made 15 changes and is looking at how the department can make other changes based on the recommendations.

"The work on this case doesn't meet the high standards we set [for foster care placement]," Thomas said.

The St. Petersburg Times sues for access to records

TAMPA — The *St. Petersburg Times* filed a lawsuit asking the court to force two foster care agencies to release records in connection with the July 4 drowning of a toddler and the drowning of the child's older sister in the same pool, 25 months earlier.

The newspaper wants access to records held by the Florida Department of Children & Families (DCF) and its Hillsborough County foster care contractor, Hillsborough Kids Inc.

The records contain information on the June 2002 drowning of 2-year-old Selia McLendon, a foster child living with Beverly Goodson, and her younger sister, Voncille Cannon.

The *Times* is seeking records pertaining to Goodson's foster care licensing, conditions in her home, the home study conducted prior to Goodson becoming caregiver to Voncille and improvements made to Goodson's swimming pool following Selia's death.

Both DCF and Hillsborough Kids have rejected the newspaper's requests for those records.

The *Times'* suit argues that the public has a right to know if Selia's death was properly investigated and whether all necessary steps were made to childproof the pool to protect Voncille's life.

Former city manager files lawsuit against city of Ocoee, mayor, commissioners

OCOEE—Former city manager James Gleason filed a lawsuit against the city of Ocoee, Mayor and commissioner Scott Vandergrift and commissioners Danny Howell and Scott Anderson, alleging they violated several state laws, including the Florida Sunshine Law, when they voted to terminate his employment.

According to Gleason's lawsuit, prior to his termination, he threatened to disclose "the fact that a majority of commissioners committed a violation of Florida's Sunshine Law by discussing and reaching an agreement upon a course and scheme to effectuate Gleason's termination from employment because Gleason refused to violate the law and ethics in dealing with the demands of the commissioners in majority." Despite his threats, he was terminated on March 4.

According to *The Orlando Sentinel*, Gleason claimed cell phone bills indicate that Vandergrift, Howell and Anderson

talked frequently in the weeks leading up to their decision. He said the number of calls and their timing suggest that the commissioners conspired against him, thereby breaking the Sunshine Law by discussing public business in private.

"I find it difficult to believe all those calls are just 'Hi, how you doing?'" Gleason said.

Vandergrift denied accusations that he and the other commissioners discussed Gleason's job during the phone calls.

In addition to the lawsuit, Gleason filed a complaint with the State Attorney's Office, which is currently reviewing the case. He is also accusing the city and commissioners of violating his freedom of speech and the Florida Public Sector Whistle-Blower Protection Act. He is asking that he be reinstated to his former position, in addition to receiving compensatory damages and attorney's fees.

ACCESS MEETINGS

THE BRECHNER REPORT

Brechner Center for Freedom of Information
3208 Weimer Hall, P.O. Box 118400
College of Journalism and Communications
University of Florida, Gainesville, FL 32611-8400
<http://www.brechner.org>
e-mail: brechnerreport@jou.ufl.edu

Sandra F. Chance, J.D., Exec. Director/Exec. Editor
Laura Flannery, Editor
Alana Kolifrath, Production Coordinator
Katie McFarland, Production Assistant

The Brechner Report is published 12 times a year under the auspices of the University of Florida Foundation. *The Brechner Report* is a joint effort of The Brechner Center for Freedom of Information, the University of Florida College of Journalism and Communications, the Florida Press Association, the Florida Association of Broadcasters, the Florida Society of Newspaper Editors and the Joseph L. Brechner Endowment.

Court rules Constitution protects right to copy and inspect records

Public records litigation is often fast and furious. Expedited consideration pursuant to Section 119.11 in the 2004 Florida Statutes means that the hearings, decisions and appeals occur rapidly. That is exactly what happened in a public records lawsuit filed on behalf of Cable News Network LP, LLLP (CNN) against the Florida Division of Elections.

The Back Page

By Gregg Thomas

records exemption that was cited in denying CNN's request for a copy of the state's list of 47,763 suspected felons.

The suspected felons list was to be used to purge felons from the voting rolls who had not regained the right to vote. A similar list had come under fire after the 2000 presidential election, which was decided by only 537 votes in Florida. After that election, several civil rights organizations filed a class-action suit against the state of Florida for allegedly wrongfully disenfranchising thousands of voters by, among other things, relying on an inaccurate felons list.

The Division of Elections had offered CNN and other news media the opportunity to inspect the current list of suspected felons, but had prohibited them from taking notes or making copies, based on a public records exemption, Section 98.0979, which was enacted after the 2000 presidential election.

CNN sued for access and declaratory relief on May 28, asserting the "enormous public interest [in] independently scrutinizing the potential disenfranchisement of such a large pool of citizens in what portends to be another closely contested presidential race." After an expedited hearing before Judge Clark on June 9, the parties cross-moved for summary judgment.

A threshold issue in the case was whether Section 98.0979, which made the suspected felons list available for inspection but not copying, constituted a public records disclosure exemption governed by the strict dictates of Article I, Section 24 of the Florida Constitution.

Although the division had made the list available for



Gregg Thomas

Thirty-three days after the public records suit was filed, Florida Circuit Court Judge Nikki Ann Clark declared unconstitutional a public

inspection, it was not made available for "inspection *and* copying." The division argued that the "inspect *or* copy" language in the Florida Constitution must be read in the disjunctive and that, because Section 98.0979 allows citizens to inspect the suspected felons list, the statute did not create an exemption to Article I, Section 24 of the Florida Constitution and, thus, did not have to comply with its requirements.

The court flatly rejected the division's argument, ruling instead that the right to inspect included the right to copy. Judge Clark declared, "[t]he right to inspect without the right to copy is an empty right indeed." In so finding, the court stressed that it is the right of the public citizen – and not that of the government – to decide whether they want to inspect or to copy a record.

The decision was significant.

The immediate impact of the ruling was astonishing. The day after the list was released, news organizations began reporting on its inaccuracies. The *Sarasota Herald-Tribune* reported that Hispanics had not been purged from the list. The substantial inaccuracies, especially the exclusion of Hispanics, caused the division to toss out the flawed list.

Additionally, Article I, Section 24 of the Florida Constitution contains strict rules that the Legislature must follow in creating exemptions to Florida's Open Meetings and Open Records laws. These rules have rarely been interpreted by Florida's courts.

The long-term impact of Judge Clark's interpretation of these rules is that the citizens of Florida will have greater access to the interactions of their government to make sure that the government, particularly with regard to the right to vote, is conducting itself appropriately.

The ruling ensures that government agencies cannot skirt the constitutional right of access to public records by granting a limited right to inspect records while prohibiting the copying of such records. Public records can now be copied, not just inspected.

Gregg Thomas is a partner at Holland & Knight LLP in Tampa, Fla., where he is in charge of the firm's media law department.